No. 06-224

FILED

DEC 21 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DANTA DAVIS,

Petitioner,

v.

DENNIS STRAUB, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONER

JOHN R. MINOCK
CRAMER & MINOCK, PLC
Attorney for Petitioner
339 E. Liberty, Suite 200
Ann Arbor, MI 48104
734-668-2200

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Reply Brief for Petitioner	1
Conclusion	6

TABLE OF AUTHORITIES

Page

CASES

Carey v. Musladin, ___U.S. ___ (Docket No. 05-785, 12/11/06) 2, 4

Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) 6

Hardcastle v. Horn, 368 F.3d 246 (3d Cir. 2004) 4

Hawkins v. Alabama, 318 F.3d 1302 (11th Cir. 2003) 4

Hill v. Hofbauer, 337 F.3d 706 (6th Cir. 2003) 4

Hoffman v. United States, 341 U.S. 479, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) 3, 4

Hope v. Pelzer, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) 3

In Re Morganroth, 718 F.2d 161 (6th Cir. 1983) 4

Lockhart v. Chandler, Supreme Court Docket No. 06-170 2

Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) 3

Marbury v. Madison, (1 Cranch) 137, 2 L.Ed. 60 (1803) 5

Roper v. Weaver, Supreme Court Docket No. 06-313 ..... 2, 6

Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) 3

Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) 2, 3, 5

TABLE OF AUTHORITIES – Continued

Page

Wright v. West, 505 U.S. 277, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1995) 5

Yarborough v. Alvarado, 541 U.S. 652, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) 3

OTHER AUTHORITIES

Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, 54 Catholic University Law Review 747, 750 (2005) 1

Brunner, *Comment: Negating Precedent and (Selectively) Suspending Stare Decisis: AEDPA and Problems for the Article III hierarchy*, 75 U. Cin. L. Rev. 307 (2006) 5

REPLY BRIEF FOR PETITIONER

The petition presents the issue what constitutes "clearly established federal law" under 28 USC 2254(d)(1). As Petitioner demonstrated, the decisions of the various Circuit Courts are in conflict regarding how to determine what constitutes "clearly established federal law," and this Court's decisions to date have "not provided enough guidance to the federal district and appellate courts which regularly grapple with determining what constitutes clearly established law."[1]

The state's Brief in Opposition barely touches on the legal issues. Instead, in a fact-bound response, the state appears to argue that Petitioner was guilty so that the legal discussion is beside the point. The state's recitation of the facts is argumentative and attempts to harmonize testimony which was clearly in conflict and contradicted. It fails to acknowledge that this was a closely tried case, and that the defense theory was seriously debated by the jury. The state's one sided version of the facts was not adopted in any of the Sixth Circuit opinions.

In this case, the Sixth Circuit took the narrowest possible approach to interpretation of the AEDPA standard: the panel majority looked first to see if there was a factually identical Supreme Court case, predictably found none, and held there was no clearly established law on the issues. That approach erroneously conflates the "contrary to" and "unreasonable application" clauses of Section 2254,

---

[1] Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, 54 Catholic University Law Review 747, 750 (2005).

cedes to state courts the authority to interpret the Constitution, and potentially violates the suspension clause, Article I, § 9, because it renders the writ practically unavailable.

The issue what constitutes clearly established federal law under AEDPA was touched on only briefly in this Court's recent decision in *Carey v. Musladin*, ___ U.S. ___ (Docket No. 05-785, 12/11/06). Just before *Musladin* was decided, the Court granted *certiorari* in another case posing the issue what is clearly established federal law, *Roper v. Weaver*, Docket No. 06-313.

The issue is posed in this case from the opposite perspective of that in *Roper*. The Sixth Circuit opinions in this case represent the most developed discussion thus far of the legal issue and its ramifications among the decisions of all the Circuit Courts. The Court should grant certiorari in this case and consolidate it with *Roper*, or hold this case pending decision in *Roper*.[2]

AEDPA does not limit relief to cases factually identical to decisions of this Court. A decision is "contrary to" federal law established by the Supreme Court if it is a decision reaching a different result from the result reached by the Supreme Court on facts that are materially indistinguishable. *Williams v. Taylor*, 529 U.S. 362, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Whether a state court's ruling involved an unreasonable application of controlling precedent from the Supreme Court is a different question: the two clauses must be given independent

[2] Another case with a petition pending before this Court, *Lockhart v. Chandler*, Docket No. 06-170, poses an issue similar to this case, whether and to what extent lower court decisions can be used in determining what is clearly established.

meaning. *Id.* at 529 U.S. 405, 120 S.Ct. 1495. General principles may be applied to a wide range of fact settings, and "[a]pplying a general standard to a specific case can demand a substantial element of judgment." *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). The test is whether the application is "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 76, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

Reading the "unreasonable application" clause to require the facts between cases be on all fours conflates it with the "contrary to" clause. The panel majority here failed to give the clauses independent meaning. Instead, the majority looked first at the facts of the case, extracted the narrowest possible legal rule to fit that situation, and then, predictably finding no factually identical Supreme Court precedent, found there is no clearly established law. That approach does not comply with this Court's prior decisions. Where a state court "unreasonably refuses to extend [a legal] principle to a new context where it should apply," an unreasonable application of clearly established federal law occurs. *Williams*, 529 U.S. at 407, 120 S.Ct. 1495; *Wiggins v. Smith*, 539 U.S. 510, 520, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).[3]

This case is a prime example why the narrow approach conflicts with this Court's rulings regarding the application of general principles. The panel majority here found that, although this Court said in *Hoffman v. United States*, 341 U.S. 479, 486-487, 71 S.Ct. 814, 95 L.Ed. 1118

[3] See, *e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002), holding, in the context of a civil rights violation, that precedent need not be on all fours in order to constitute "clearly established" law.

(1951), that the Fifth Amendment must be asserted in response to a question, and despite the fact that since *Hoffman* the lower courts, even the Sixth Circuit, *In Re Morganroth*, 718 F.2d 161, 167 (6th Cir. 1983), have relied on *Hoffman* for that principle, the statement in *Hoffman* is dicta and there is no governing precedent.[4] While dicta normally are statements unnecessary to the resolution of a case, this Court often announces principles of law which are not actually applied in the case before it, but which are treated by courts and commentators as established federal law, because it is the Supreme Court speaking. As Justice Stevens recently said, concurring in *Musladin*, "[v]irtually every one of the Court's opinions announcing a new application of a constitutional principle contains some explanatory language that is intended to provide guidance to lawyers and judges in future cases." *Carey v. Musladin*, ___ U.S. ___ (Docket No. 05-785).

The narrow reading of the unreasonable application prong not only erroneously conflates the two clauses, it stands this Court's case-by-case view for the application of general principles on its head. Under this approach, it is not the infrequent case that yields a result so novel it

---

[4] Circuit decisions – like *In re Morganroth, supra* – can be persuasive authority in determining what is clearly established federal law. As Petitioner demonstrated, a majority of circuits have concluded that a habeas court need not limit itself solely to Supreme Court case law to determine what is clearly established. See, *e.g.*, *Hardcastle v. Horn*, 368 F.3d 246, 256, fn. 3 (3d Cir. 2004); *Hill v. Hofbauer*, 337 F.3d 706, 716 (6th Cir. 2003); *Hawkins v. Alabama*, 318 F.3d 1302, 1309 (11th Cir. 2003).

forges a new rule. Instead, the infrequent case is the one where a court can find ***any*** precedent.[5]

The narrow approach also yields the authority to interpret federal law to the state courts. *Williams*, 529 U.S. at 378-379, 120 S.Ct. 1495 (Stevens, J., dissenting in part). Even if every Circuit were in agreement that the Constitution as construed by this Court protected a particular right, under the narrow approach a federal court cannot grant a petition based on that right if this Court has not spoken, even if this Court's precedents clearly indicated it would so rule when confronted with the right set of facts. This is not the judicial power under the Constitution where "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, (1 Cranch) 137, 176, 2 L.Ed. 60 (1803).

The narrow approach also raises separation of powers issues, by requiring lower federal courts to ignore not only the holdings of other circuits but even their own jurisprudence and that of superior courts. Under the narrow approach, lower Article III courts must refuse to issue a writ even when under circuit precedent state trial courts committed constitutional error, if this Court has not yet addressed the issue in a case on all fours. To the extent that this view removes *stare decisis* effect from constitutional rulings by Article III courts, it conflicts with Article III.[6]

---

[5] Cf. *Wright v. West*, 505 U.S. 277, 309, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1995) (Kennedy, J., concurring).

[6] Brunner, *Comment: Negating Precedent and (Selectively) Suspending Stare Decisis: AEDPA and Problems for the Article III hierarchy*, 75 U. Cin. L. Rev. 307 (2006).

The narrow reading of 2254(d)(1) in this case also arguably suspends the writ of habeas corpus in violation of Article I, Section 9 of the Constitution. Under the narrow standard the writ is available in theory but illusory in fact. The Suspension Clause would be a sham if it could be evaded by congressional requirements that render the writ unavailable. *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 2672, 159 L.Ed.2d 578 (2004) (Scalia, J., dissenting).

Prior to the state decision in this case, this Court had set forth "clearly established federal law" regarding the relevant aspects of the Fifth and Sixth Amendments. The Michigan Court of Appeals *per curiam* opinion here was contrary to that law, because it failed to recognize or apply the governing principles, and to the limited extent it recognized them, it unreasonably applied them.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that this Court grant a writ of *certiorari* and consider joining this case with *Roper v. Weaver*, or, in the alternative, hold this petition until the decision in *Roper*.

Respectfully submitted,

JOHN MINOCK
CRAMER & MINOCK, PLC
Attorney for Petitioner
Danta Davis
339 E. Liberty, Suite 200
Ann Arbor, MI 48104
(734) 668-2200